WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

January 11, 2006

The Honorable Rob McKenna
Attorney General for the State of Washington
Office of the Attorney General
Mail Stop: 40100
Olympia, Washington 98504-0100

Re: Comments to Proposed Rules and Comments on the Public Records Act

Dear Attorney General McKenna:

On behalf of the Washington Association of Prosecuting Attorney, enclosed please find the written comments to the Attorney General's proposed model rules and comments to the public records act.

We commend you and the people who work for you in the outstanding effort represented by this work and the engaging public process that led up to it. We are pleased to be a part of that process.

The Prosecuting Attorneys and the Elected Officials and Officers we represent are committed to an open government consistent with the purpose of the Public Records Act. We know first hand the benefits of a transparent public process. We are also aware of the way in which public records may contain private, sensitive information, confidential records, and other items that the Legislature said should not be released. In addition, we have witnessed the abuse of the public records process by requesters and know of the need to establish rules to prevent the disruption of county governance.

We agree that the model rules provide an opportunity to educate the public and agencies of the competing polices in the public records laws and the best way to assure that those policies are followed. We also believe that the model rule process provides an opportunity for the Attorney General to lead this education process and to develop model forms and lists to be used by other agencies.

About two years ago, our office developed a set of model rules and forms for counties and at that time, we placed the topic of "Public Records" on the curriculum of the training for civil attorneys that is done each year. These training sessions are popular, and we

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agree with the need to assure this training occurs each year. If you have not already received a copy of the model ordinance and forms, please let us know and we will provide you with another copy.

Our comments to the model rules are extensive, and in some cases critical of word choice or tone. We do this so that the final rules will be consistent with the Public Records Act and be workable for agencies of all sizes and for the wide variety of public records requests to which County Officials respond.

We would welcome a phone call or meeting to discuss our comments.

Very truly yours,

Randall K. Gaylord
Vice President

WASHINGTON ASSOCIATION OF
PROSECUTING ATTORNEYS

cc (all with enclosures) : All County Prosecuting Attorneys
Ms. Deborah Wilke, Executive Director, WA Association of County Officials
Mr. Bill Vogler, Executive Director, WA State Association of Counties

WASHINGTON STATE PROSECUTING ATTORNEYS

COMMENTS AND SUGGESTED CHANGES TO THE WASHINGTON STATE ATTORNEY GENERAL PROPOSED MODEL RULES (WITH COMMENTS) (CH. 44-14 WAC) FOR AGENCIES IMPLEMENTING THE PUBLIC RECORDS ACT

JANUARY 12, 2006

Incorporating Comments provided by Prosecuting Attorneys and Deputy Prosecutors from the large, medium and small counties of Spokane, Pierce, Thurston, Benton, Skagit, Jefferson and San Juan

All comments are shown in italics.
Suggested changes shown in red-line strikeout.
"Requestor" changed to "requester" throughout.

WAC 44-14-00001 Statutory authority and purpose.

- *The goal of promoting a "culture of compliance" inaccurately presumes there currently exists a "culture of non-compliance." Neither the legislative history nor the outreach project supports that conclusion, and it should be omitted. It is a laudable goal to develop "standard best practices," as stated in the first paragraph, but that is goal is contradicted by the reference in the last paragraph that the approach taken to any request may need to be flexible based upon the size and resources of the agency and the complexity of the request. The model rules are intended to provide guidance and consistency in the implementation of the Public Records Act, and they may or may not be "best practices" depending on the circumstances.*
- *When reviewing and revising the rules, we urge you to keep in mind that the rules will need to be explained and implemented by agencies with no paid staff that consist of three volunteer citizens volunteering part-time to help their government, such as the cemetery districts in a small county. The goal should be to promote simple, easy to understand rules, not complex procedures and commentary. We urge you to review and revise the rules from the perspective of the small agency.*

WAC 44-14-00002 Format of model rules. [no change]

- *We have found the numbering system and format used by the attorney general difficult to work with. The distinction between the three digit rule and the five digit commentary is confusing. We recommend that code numbers only be used for the model rules and not for the comments. If the attorney general insists on retaining the comments (more on that in the next section) then the comments should be formatted in a manner similar to the Comments to the Model Rules of Professional Conduct*

(RPCs) or the Code of Judicial Conduct (CJC). Using that approach, the comments are clearly set out as comments by using different indentation and italicized fonts. The comment that accompanies a section or subsection should be placed just below the section in italics.

WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules often use the word "should" or "may" to describe what an agency or requester is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty. While the model rules and comments are nonbinding, they should be carefully considered by requesters and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.

- *Although the above under-scored language makes it clear that the Model Rules and Comments are not binding, as a matter of fact, the court will more than likely afford substantial weight to the model rules and the comments when considering challenges to public disclosure responses. The charge to the attorney general in the 2005 legislative session was very clear. The Model Rules were to address certain subjects. The Model Rules proposed in many instances exceed the subjects set forth in the legislation. In other instances, the Model Rules and/or Comments are not consistent with the present provisions in chapter 42.17 RCW as described in the law and in cases interpreting the law.*
- *The comments should state that every agency and requester should consider the text of the law and the cases interpreting the law, and, where appropriate, cases interpreting the Federal Freedom of Information Act. When the model rules refer to RCWs the entire RCW should be used, or augmented by the holdings of existing cases, and not by the opinion of the attorney general.*
- *We believe the comments to the model rules exceed the direction given by the legislature and set out suggested policies and procedures that may or may not be practical. In other words, the comments try to do too much, and in so doing, they don't do enough. In many instances, we believe the comments do not provide a complete or fair explanation of the legal and policy considerations that concern local government and the policy concerns that are raised by exemptions.*
- *We recommend that the comments be omitted from the rulemaking. As an alternative, the comments should become part of the recommendations of the attorney general for state agencies or part of the attorney general's desk book on the public records act. This will assure that citizens and judges will afford the status to the comments that is appropriate under the law.*

WAC 44-14-00004 Recodification of the act.

- *Given the fact that the recodification has occurred and will take effect on July 1, 2006, any references to statutes should refer to both the references in RCW 42.17 AND the new references in RCW 42.56. In the alternative, the new statute references should be used. As a practical matter, by the time any model rule is implemented by a*

state or local agency, the new statutes will be in effect. If this is not done the work will be obsolete in a short period of time and it will require unnecessary work by hundreds of agencies which will go to the effort of replacing the cross references.

WAC 44-14-00005 Training is critical. Modern governments collect a great deal of information that may be private or confidential. To assure that private and confidential information is not inadvertently disclosed, the act requires examination of scores of statutes, and often, redaction of portions of records. In addition, the~~The~~ act ~~is complicated~~contains tight timeframes to accomplish tasks and depending on the nature of the request, ~~and~~ compliance requires training. ~~Training can be the difference between a satisfied requester and expensive litigation.~~ The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance. The attorney general will conduct four trainings each year. ~~All~~ Agency employees responsible for compliance with the public records act should be encouraged to attend these trainings. ~~receive basic training on public records compliance and records retention; public records officers should receive more intensive training.~~

- *Admittedly, training is essential for responding to public records requests. We do not subscribe to the belief that the Act is "complicated." "Complications" occur because of the broad scope of requests, the tight time lines and the need for public officials to abide by the duty to disclose certain records, and exempt other records. The attorney general should take the opportunity to explain why it creates tensions and difficulties for agencies. This will help requesters and public agencies. We believe that the attorney general's office should assume the responsibility of providing training to all agencies as that terminology is defined in the Public Disclosure Act. Additionally, although the Public Disclosure Act addresses "protecting public records from damage" in RCW 42.17.290, we do not believe that the use of that terminology also means "records retention" as used in the above comment. We recommend that the underlined language be deleted.*
- *Small agencies without paid staff or a public lawyer who represent them would greatly benefit if the attorney general provided a "hotline" for agencies to call to answer questions on how to apply the Act to specific requests.*

WAC 44-14-00006 Additional resources. [no change]

- *These "additional resources" should not be mentioned unless the attorney general recommends them as being complete, accurate and up-to-date. We recommend only that public resources be mentioned, and that private resources such as the Washington Coalition for Open Government be omitted.*

WAC 44-14-010 Authority and purpose. (1) RCW 42.17.260(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. ~~The act defines "public records" to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained "by the agency." These include electronic records. RCW 42.17.260(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records~~

(2) The purpose of these rules is to implement the act. These rules provide information to persons wishing to request access to public records of the (agency) and establish expectations both of requesters and of (agency) staff who are to assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted consistent with these competing policies. ~~in favor of disclosure.~~In carrying out its responsibilities under the act, the (agency) will be guided by the provisions of the act describing its purposes and interpretation, and court decisions interpreting the act.

- *The definition of public records and requirements for a list of laws that exempt disclosure are discussed later in the rules and it is unnecessary, duplicative and incomplete to refer to them here.*
- *We recommend an approach where terms are defined in a definitions section and the comments to those terms (if the comments are retained) are then placed with the definition. Using this approach, you would have a section on the definition of "public record," "agency" and so forth, and then you would place the comments regarding that definition nearby. (Comments on the definition of public record are located in proposed WAC 44-14-03001.) This would make the model rules easier to work with.*
- *The reference to the list of exemptions is confusing here. We think a better approach is for the attorney general to publish its list of exempt records. Better yet, the attorney general should, as part of this rulemaking, prepare a MASTER LIST OF EXEMPTIONS so that all agencies can incorporate that list by reference. A good place to start is the master list that has been prepared for cities and counties by the Municipal Research & Services Center. It does not make sense that hundreds of agencies and elected officials are spending time making lists of the laws that exempt records from disclosure. One list should be sufficient.*
- *If you insist on retaining the language regarding RCW 42.17.260(2) you should make it complete by adding "An agency's failure to list an exemption shall not affect the efficacy of any exemption."*
- *By stating these rules will be construed "in favor of disclosure" the model rule incorrectly suggest that disclosure trumps privacy concerns, that every scrap of paper located in a public office is a "public record," or that exemptions can be disregarded. Accordingly, a modification is proposed to reflect that agencies are guided by compliance with all laws and court decisions construing those laws.*
- *Note: there is repetition between this rule proposed WAC 44-14-060 and the comments located at WAC 44-14-06001 and - 2. Revisions should be made so that each topic is covered only once.*

Comments to WAC 44-14-010
NEW SECTION
WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW 42.17.260(1). "'Agency' includes all state agencies and local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal

corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.17.020(1). A court is not an "agency" subject to the act.1 Access to and the price to be paid for copies of court records is governed by the Washington Constitution, court rules and common law and other statutes. ~~These model rules, therefore, do not address access to court records~~. An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:
(1) Whether the entity performs a government function;
(2) The level of government funding;
(3) The extent of government involvement or regulation; and
(4) Whether the entity was created by the government. Op. Att'y Gen. 2 (2002).
Some agencies, most notably non-charter counties, are governed by several independently elected officials ~~a collection of separate quasi-autonomous departments which are governed by different elected officials~~ (~~such as a~~ county assessor, county auditor, county clerk, county sheriff, county commissioners, and prosecuting attorney). ~~However, the act defines the county as a whole as an "agency" subject to the act. RCW 42.17.020(1).~~ Counties are encouraged ~~The act requires an agency~~ to coordinate responses to records requests across departmental lines. RCW 42.17.253(1) (2005).

- *As written, the comment is inconsistent with court decisions. Although it is clear that a "county" is an "agency" as that term is defined in RCW 42.17.020(1), we believe that there is substantial confusion by combining all other elected officials under "county." In Dawson v. Daly, 120 Wn.2d 782 (1993) the supreme court said "RCW 42.17.020(1) defines "Local Agency" to include "every county ... **or** any office, department or agency thereof ..." The Snohomish County prosecutor's office is **an agency** covered by the Act because it is an office of the county." (Emphasis supplied)*
- *Code or "non-charter" counties have present legitimate questions of the legal authority for one elected official (such as the Board of County Commissioners) to adopt rules governing the methods another elected official must follow to comply with the law. For code counties, we believe that the language must be changed as indicated above. Charter counties that place administrative responsibility with an administrator or executive may have the authority adopt the approach you have suggested.*
- *These changes will also carry over to the section on public records officer. As stated below in more detail, we recommend that each elected official serve as the public records officer for the public records requests made to the office of that elected official.*
- *Elected officials should be able to choose whether the model rules as adopted by the County Commissioners will be followed by their office.*
- *The discussion of court records should be clarified. While court case files are clearly not subject to the Public Records Act, court administrative records may be subject to the Act. Superior court case files are held by the separately elected county clerks, not the courts. The Nast holding applies to the court records held by the county clerks and judges.*

NEW SECTION

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides: "Agencies shall adopt and enforce reasonable rules and regulations . . . to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency . . .. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.17.290. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requesters and the "most timely possible action on requests." At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act provides that providing public records should not "unreasonably disrupt the operations of the agency." RCW 42.17.270. This provisions allows an agency to take reasonable precautions to prevent a requester from disrupting other essential functions of the agency.~~being disrespectful to agency staff.~~

- *The responsibility to adopt regulations falls on the "Agency." As was referenced in the immediately preceding comment, a question remains as to whether or not a board of county commissioners in a code county can adopt regulations affecting other elected officers.*
- *We believe you should state the minimum portions of the model rules that must be adopted to satisfy the requirements of this section. To have to adopt cumbersome written rules which will provide only a further trap is going to be time consuming and will be a huge problem for many smaller agencies. Have you considered whether every special purpose district comprised of unpaid elected officials, such as cemetery districts, will also be required to adopt these rules? If so, you should say so.*
- *The last sentence inaccurately limits the scope of rules by equating the word "disruptive" with "disrespectful." Disruptive is much more than disrespectful. For example, a broad, time consuming request can be "disruptive" and an agency may take reasonable precautions to assure that other business of the agency does not grind to a halt during the time that the records request is being satisfied. In addition, an agency may adopt rules or policies to protect documents from being disorganized, marked upon, lost, and to protect the privacy rights of citizens and government employees. The preferred approach, as shown above is to use the language of the statute.*

NEW SECTION

WAC 44-14-01003 Construction and application of act.

- *We recommend the second paragraph be omitted or revised. The reference to "purely personal information that has absolutely no bearing on the conduct of government" is not in the law or an extension of the case law. Every public records request must be analyzed under the definition of "public records" and the exemptions to the law.*

AGENCY DESCRIPTION--CONTACT INFORMATION--PUBLIC RECORDS OFFICER

NEW SECTION

WAC 44-14-020 Agency description--Contact information—Public records officer. (1) The agency (describe services provided by agency). The agency's central office is located at (describe). The agency has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(fax number)
(e-mail)

Information is also available at the (agency's) web site at www.(.*.*.*.*.*.*).

(2) The public records officer will serve as a point of contact for members of the public and oversee compliance with the act by other employees of the agency. ~~but another agency staff member can process the request. The public records officer and the agency will provide the "fullest assistance" to requesters in making requests for identifiable records under the act, to create and maintain for use by the public and (agency) officials an index to public records of the (agency, if applicable), to ensure that public records are protected from damage or disorganization, and to prevent fulfilling public records requests from causing excessive interference with essential functions of the (agency).~~

- *Counties support a clear designation of person(s) who are accountable to assure that the Act is complied with, especially for county departments and volunteers.*
- *The 2005 legislative session specifically required each agency to designate/appoint a public records officer. The responsibilities of the public records officer are very clear. Specifically, "...a public records officer... is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of this chapter." The above stricken language is not consistent with the 2005 amendment. This section should be revised as indicated so that it is exactly the same as set forth in the 2005 amendment. There is no legal basis for establishing requirements that the public records officer create and maintain an index to public records or ensure records are protected from damage. In many agencies the public records officer is a clerical or administrative staff person who has no authority over any of the records. The responsibilities of the public records officer, as established in RCW 42.17.253, are only to be a point of contact for the public to make record requests and to oversee the agency's compliance with the Act.*
- *The proposed rule states that an agency "cannot invoke a procedure if it did not publish it as required." This is a misreading of the statute. RCW 42.17.250(2) states that "a person" may not be required to "resort to, or be adversely affected by" a procedure if the procedure was not published or displayed as required. Many government procedures are for internal use. If a procedure is not one that a member*

of the public is required to follow, nor a procedure that will adversely affect the person, RCW 42.17.250(2) does not apply.

- *Non-charter counties should have the option of making each elected official a public records officer. This is the approach counties have taken in proposed model rules that have been circulated to county prosecutors. Mr. Greg Overstreet has been provided a copy of sample language as part of the County Model Rules. Additional copies are available on request.*
- *The model rules should also reflect that the public records officer is the person to contact for records that may be held by volunteers of the county, as indicated in the County Model Rules.*

Comments to WAC 44-14-020

NEW SECTION

WAC 44-14-02001 Agency must publish its procedures. An agency must publish its public records policies, organizational information, and methods for requesters to obtain public records. RCW 42.17.250(1).1 A state agency must publish its procedures in the Washington administrative Code and a local agency must prominently display and make them available at each of its offices. RCW 42.17.250 (1)(a). ~~An agency cannot invoke a procedure if it did not publish it as required. RCW 42.17.250(2).~~

- *The basis for the above stricken language is apparently RCW 42.17.250(2). The language is stricken because it is not a correct statement of that statute. Instead of the above underscored language, the following language should be used: "* ***A person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed except to the extent that he has actual and timely notice of the terms thereof."***
- *Does this comment require each code county elected official to publish separately or can the county commissioners of a code county publish on behalf of all elected officials?*
- *The comment should state that a county procedure is "prominently displayed" if it is adopted as an ordinance. How would you propose that small agencies without an office "prominently display" or publish? Can you suggest other ways that small agencies would "prominently display" its procedures, especially considering that the AG's model ordinance and comments are 52 pages long?*
- *Is it really the duty of the public records officer to create and maintain an index? Do you consider that practical? How does the attorney general maintain its index?*
- *If reference is made to the "records index" then it should include the language from RCW 42.17.260(4) which allows a local agency to publish notice of why such an index does not need to be provided. A separate section should be devoted to the index. Given the volume of documents received by most counties, it is all we can do to file the documents, and there is insufficient staff to prepare indexes.*

NEW SECTION

WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW 42.17.253(1). The purpose of this requirement is to provide the public with one

point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW 42.17.253(3). The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person(s) in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

- *Changes should be made to this section in light of the approach taken with respect to a county's designation of public records officer(s).*

AVAILABILITY OF PUBLIC RECORDS

NEW SECTION

WAC 44-14-030 Availability of public records. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Unless otherwise agreed to by the public records officer or designee, r~~R~~ecords must be inspected at the offices of the (agency). Records are not available on demand. The Public Records Officer may request that the requester make an appointment to inspect the records at a mutually convenient time that avoids interference with other governmental obligations.

2) **Records index.** (*If agency keeps an index.*) There is available for use by members of the public an index of public records, including (describe contents). It may be accessed on-line at (web site address). (If there are multiple indices, describe each and its availability.)

(*If agency is local agency opting out of the index requirement.*) The agency finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with agency operations in the following ways (specify reasons).

(3) **Organization of records.** ~~The agency shall maintain its records in a reasonably organized manner.~~ The agency shall take reasonable actions to protect records from damage and disorganization. A requester shall not take agency records from agency offices without the permission of the public records officer. A variety of records is available on the (agency) web site at (web site address). Requesters are encouraged to view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (agency) should make the request in writing on the agency's request form, or by letter, fax, or electronic mail addressed to the public records officer and including the following information:

- Name of requester;
- Address of requester;
- Other contact information, including telephone number and any e-mail address;

- Identification of the public records adequate for the public records officer to locate the records; and
- The date and time of day of the request.

The agency may exercise its discretion to provide records upon a verbal request.

(b) If the requester wishes to have copies of the records sent instead of simply being made available for copying, he or she should so indicate and provide payment in advance at the rate established in Section ___. ~~indicate a willingness to pay for the records. Pursuant to section (insert section), standard photocopies will be provided at (amount) cents per page.~~

(c) A form is available for use by requesters at the office of the public records officer and on-line at (web site address).

(d) The public records officer may accept requests for public records that contain the above information by telephone or in person. If the public records officer accepts such a request he or she will confirm receipt of the information and the substance of the request in writing. A request for records sent by email is not effective until the request has been acknowledged as received by the public records officer.

- *RCW 42.17.290 makes it clear that agencies are responsible "...to protect public records from damage or disorganization." It does not create a responsibility "... to maintain records in a reasonably organized manner." Accordingly, this language should be deleted.*
- *Although a public disclosure request can come in any form, an electronic form can create some issues. For instance, many counties have software programs that block various types of e-mail. As such, if a public disclosure request contains advertising, it might be blocked and never received by the agency. This circumstance should be acknowledged if the regulation addresses the use of electronic mail requests by requiring confirmation of receipt of the request, as indicated.*
- *Language is added to notify citizens that inspection is not required "on demand" and that citizens may need to make an appointment with the public records officer to inspect or copy public records.*
- *For the reasons stated below, a request should be in writing, and the agency should have the discretion to allow a verbal request. (See discussion in response to comment 03006, below.)*

Comments to WAC 44-14-030

NEW SECTION

WAC 44-14-03001 "Public record" defined. Not every document in the possession of an agency is a public record. The c~~C~~ourts use a three part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.17.020(41). "Writing" is defined very broadly as: ". . . handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes,

photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW 42.17.020(48).

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.17.020(41). Almost all records held by an agency relate to the conduct of government; however, some do not. Documents personal to the employee are not public records, unless such documents were used by the agency. Examples are personal notes, personal emails, personal appointment calendars, telephone messages, personal diaries, unsolicited commercial mail from vendors, uncirculated draft correspondence, etc. ~~A purely personal record having no relation to the conduct of government is not a "public record."~~ Even though a personal document might not be a public record, if it is used by the agency, it is subject to disclosure, unless a court decides otherwise. ~~Even though a purely personal record might not be a "public record," a record of its existence might be. For example, a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the e-mail itself is not.~~

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.17.020(41). A record ~~can~~ may have been ~~be~~ "used" by an agency, even if the agency does not ~~actually~~ possess the record at the time the request is received. If an agency uses a record in its decision-making process it is a "public record." For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process. The agency would be responsible for obtaining the public record, unless doing so would be impossible. An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure.

(4) **Examples.**

The courts have said the following documents are public records: handwritten answers to a questionnaire, emails to family members that are used for discipline, medical records at a public hospital, records of contributions by an Indian Tribe, etc.

The Washington courts have said the following written documents are not public records: personal notes taken during a job interview, requests for verification of employment. Federal courts have also confirmed that personal notes, telephone messages, personal calendars, personal diaries of government work and other items made for the sole use of the government employee and not shared with others are not public records.

(5) **Location of Records.**

Sometimes agency employees work on agency business from home computers. This does not make the home computer subject to inspection by the public. Because these records were "used" by the agency and relate to agency business, the home-computer documents (which include e-mail) are "public records" because they relate to the "conduct of government." RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property. If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. However, because the home computer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct

employees that all public records, regardless of where created, should eventually be stored on agency computers. State Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely ~~blind carbon~~ copy ~~("bcc")~~ work e-mails ~~back~~ to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward ~~any~~ responsive documents ~~back~~ to the agency, and the agency should process the request as it would if the records were on the agency's computers.

- *The first sentence is recommended because it is consistent with the law and provides a balanced approach.*
- *Although Tiberino v. Spokane County, 103 Wn. App. 680 (2000) makes it clear that electronic communications are "writings," we recommend that RCW 42.17.020(42) be modified to specifically include electronic communication as a "writing."*
- *Subsection 2 is not a correct statement of the law. There is no standard based upon "purely personal" records, and that phrase should be deleted. Absent its deletion, public agencies will be required to identify in conjunction with public disclosure requests, all kinds of junk mail, etc. that are received. We have made suggestions that are consistent with the law.*
- *In general, this section is far too broad, and inconsistent with the case law, especially, subsection (3). The comments should reflect developments from the cases, but not speculate and offer editorial comment. As an alternative to the suggested changes almost all of subsection (3) should be removed (delete the second and third paragraphs in their entirety and leave only the first sentence of subsection (3)).*
- *In sub-paragraph 3, the attorney general's office is attempting to develop a best practices approach to be used by agencies that allow their employees to use home computers for official agency business. To provide flexibility, each agency should be allowed to establish its own best practices. Accordingly, we recommend that the underscored language in sub-paragraph 3 be deleted or altered so that it is shown as a recommendation to state agencies.*
- *This section should address the procedure to follow when the agency holds portions of records of another public agency. The Rule should explain when the requester should be sent to the originating agency and the extent to which the originating agency should be notified of the request because it may desire to assert exemptions that are not familiar to the agency holding the record.*

NEW SECTION

WAC 44-14-03002 Times for inspection and copying of records. An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW 42.17.280. If the agency ~~is very small and~~ does not have customary office hours ~~of at least thirty hours per week, the records must be available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. However~~, the agency public records officer and requester should ~~can~~ make mutually agreeable arrangements for the times of inspection and copying.

- *RCW 42.17.280 addresses times for inspection and copying of records. It does not include the language for "small offices" or limited hours. We are aware of many*

small agencies that have volunteers who work regular jobs who would be unable to meet this standard. Accordingly, we recommend that this language be amended to provide flexibility to the agency and requester. This approach satisfies the Public Records Act.

NEW SECTION

WAC 44-14-03003 Index of records. State and local agencies are required by RCW 42.17.260 to ~~provide~~ make and maintain an index for certain categories of records. An agency is not required to index every record it creates, possesses or uses. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot rely on or cite to a public record as precedent unless it was indexed or made available to the parties affected by it. RCW 42.17.260(6). An agency should post its index on its web site. The index requirements differ for state and local agencies. A state agency must index only two categories of records:

(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and

(2) Final orders, declaratory orders, and interpretative statements of policy issued before June 30, 1990. RCW 42.17.260(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues an order ~~or adopts an ordinance~~ specifying the reasons why doing so would be "unduly burdensome" or "interfere with agency operations." RCW 42.17.260(4). To lawfully opt out of the index requirement, a local agency must actually issue such an order or adopt an ordinance specifying the reasons it cannot maintain an index.

~~The index requirements of the act were enacted in 1972 when agencies had far fewer records and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requester in locating public records.~~

- *The change in the first section is necessary for the rule to match RCW 42.17.260.*
- *The reference to "ordinance" contemplates a public hearing and is not a requirement for an order of RCW 42.17.260(4)(a). The legislature has been very clear when they want action by ordinance of the legislative body and when an order or motion is sufficient. Besides, most agencies do not have the power to create an ordinance.*
- *The responsibility to opt out from the requirement for maintaining an index is very complicated for a code county which has separately elected officials. RCW 42.17.260 This policy should be modified to clarify who has the responsibility to opt out of the indexing requirements in a code county.*
- *We believe that there are few agencies that provide a meaningful index of public records. There are just too many public records and too few resources to index them.*
- *An index "posted to a website" creates additional burden on agencies to maintain the index at another location. If maintained, these documents become stale quickly, and this is not practical as a standard "best practice" for many counties.*

- *Most public records requests arrive well before an index could ever be created or updated. If an agency has the duty to provide assistance in identifying and locating, why is an index even necessary?*
- *We believe the attorney general should support legislation to eliminate the indexing requirement altogether.*
- *In the alternative, the attorney general should follow the statutory instructions that "rules establishing systems of indexing shall include but not be limited to the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index." RCW 42.17.260. The proposed rule does not include the information requested by the legislature and is deficient in this regard.*
- *We believe the attorney general should provide detail on the form, use, maintenance and location of its INDEX OF RECORDS as a model, or provide an example of an efficient, useful, cost effective model. (We searched your website for your index of records but we could not find it!)*
- *Any indexing system should be flexible to address the needs of everything from volunteer cemetery districts to large charter counties.*
- *The last paragraph does not reflect the law or current circumstances. We recommend that it be safely omitted.*
- *The statement in the proposed rule that an agency "cannot rely on or cite to a public record unless it was indexed or made available to the parties affected by it" is an incorrect statement of the law. To correctly state the requirement of RCW 42.17.260(6), the proposed rule should be changed to state that an agency "cannot rely on or cite to a public record* ***as precedent*** *unless it was indexed or made available to the parties affected by it."*

NEW SECTION

WAC 44-14-03004 Organization of records. An agency must "protect records from damage or disorganization." RCW 42.17.290. An agency owns public records and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requester to take originals of agency records out of the agency's office. An agency may send originals to a ~~reputable~~ commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5). The legislature encourages agencies to electronically store and provide public records:

> Broad access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens . . . and governments. . . .
>
> It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.

RCW 43.105.250. An agency fulfills its duty to make public records available for inspection and copying if it notifies a requester of a link to a website with the document and the requester does

not request personal inspection or a paper copy. Many agencies have found this is a useful way to provide access to documents that are requested frequently. ~~As more fully described in WAC 44-14-04023, an agency fulfills its obligation to provide "access" to a public record by providing a requester with a link to an agency web site containing an electronic copy of that record. Agencies are encouraged to do so.~~

- *The last two sentences to this comment recommend that agencies place public records on the agency web site. Although this is an admirable goal, it is very costly for agencies. We recommend that alternative language be used to explain that an agency can satisfy its obligation for inspection and copying of records by placing them on a website. If access by website does not satisfy the Public Records Act, there is little benefit to an agency in making the records available on a website.*
- *Agencies should be encouraged to protect public records by filing them at county-owned property. Volunteers and employees who work off-site should be required to return all public records to the agency.*
- *The use of the adjective "reputable" in describing a commercial copy center is not clear, and is safely omitted. Is a local small town copy center "reputable?" What do you mean by reputable? Should the county conduct a criminal history check of the owner?*

NEW SECTION

~~WAC 44-14-03005 Retention of records. An agency is not required to retain every record it ever created or used. Retention schedules determine when records can lawfully be destroyed. The secretary of state adopts retention schedules for general classes of records for state and local agencies. See chapter 434-615 WAC. Individual agencies are required to adopt retention schedules for their own records. The retention schedule for local agencies is available at www.secstate.wa.gov/archives/gs.aspx. Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling e-mails can be destroyed instantly but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all e-mails after a short period of time (such as thirty days). While many of the e-mails could be destroyed instantly, many others must be retained for several years. Indiscriminate automatic deletion after a short period prevents an agency from complying with its retention duties and its public records duties. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules. The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020. An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW 42.17.290. The agency is required to retain the record until the record request has been resolved. An exception is for certain portions of a state employee's personnel file. RCW 42.17.295.~~

- *The only provisions within chapter 42.17 RCW that address "destruction of public records" are RCW 42.17.290 and RCW 42.17.295. This entire section exceeds that required by the Public Records Act. Chapter 40.14 RCW addresses the destruction of*

public records. Some prosecutors believe this entire section can be safely omitted. Other prosecutors believe some discussion of retention and destruction of records is helpful to explain to the public the system of archiving and destroying public records. See the County Model Records Ordinance, Section 16.

- *We believe the topic of retention and destruction of e-mails deserves a separate section all to itself and should be the subject of every training by the attorney general. For example, should hard drives of agency employees be "retained?" While "automatic deletion of all e-mails" may not be appropriate, what is appropriate? Perhaps you could provide sample policies that are good or your own policy? This is an area of the law in which frequent advice is needed to address emerging issues, and this section is insufficient.*

NEW SECTION

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request. A request can be sent in by mail. RCW 42.17.290. A request can also be made by e-mail, fax, or verbally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250 and 42.17.260(1); RCW 42.17.060 (relating to certain state agencies); RCW 34.05.220 (authority for all state agencies). An agency is encouraged to make its public records request form available on its web site.

For simple requests, a v~~V~~erbal request~~s~~ may be allowed at the option of the agency employee. For any large request or a request that describes a file or category of documents, a written request should be made. ~~but are problematic.~~ A verbal request does not memorialize the exact records sought and therefore, prevents a requester or agency from later proving what was requested. ~~included in the request.~~ Furthermore, as described in WAC 44-14-05003(1), a requester must provide the agency with reasonable notice that the request is for public records.~~;~~ V~~v~~erbal requests, especially to agency staff other than the public records officer, may not provide the agency with the required reasonable notice. Therefore, requesters are strongly encouraged to make written requests. If an agency receives a verbal request that cannot be filled immediately, the agency staff person receiving it should ask the requester to put the request ~~immediately reduce it to~~ in writing and then verify in writing ~~with the requester that it~~to assure that it correctly memorializes the request.

An agency should have a public records request form. An agency request form should ask the requester whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form should recite that inspection of records is free and provide the per-page charge for standard photocopies. An agency request form should require the requester to provide contact information so the agency can communicate with the requester to, for example, clarify the request, inform the requester that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or e-mail should be provided. Requesters should provide an e-mail address because it is an efficient means of communication and creates a permanent record. An agency should not require a requester to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requester and requiring it might intimidate some requesters. An agency may ask a requester to prioritize the records he or she is requesting so that the most important records are provided first. An agency is not required to ask for prioritization, and a requester is not required to provide it. An agency cannot require the requester to disclose the purpose of the

request with two exceptions. RCW 42.17.270. First, if the request is for a list of individuals, an agency may ask the requester if he or she intends to use the records for a commercial purpose and intends to directly contact or personally affect the individuals named in a list. An agency should specify on its request form that the agency is not required to provide public records consisting of a list of individuals for a commercial use. RCW 42.17.260(9). Second, an agency may seek information sufficient to allow it to determine if another ~~statute~~ law which prohibits disclosure. For example, some statutes allow an agency to disclose a record only to a claimant for benefits or his or her representative. In such cases, an agency is authorized to ask the requester if he or she fits this criterion and treat him or her differently than someone who does not. An agency is not authorized to require a requester to indemnify the agency. Another example involves a request made by a defendant in a criminal matter where the defendant is represented by counsel. In these circumstances court rules may prohibit disclosure of the documents or dealing with a person represented by counsel.

- *We agree that public records procedures should allow an agency to quickly and informally respond to documents. For example, a verbal request for "that report in your hand" can be easily fulfilled by simply going to a copy machine and providing the records. Documenting what was done is creates unnecessary difficulty. On the other hand, a public records request that covers many files over long periods of time and involving several county departments* ***must*** *be in writing to be carried out, and it is reasonable to ask the requester to make such a request in writing. The rules and the comments should reflect this distinction, or allow agencies to provide for such a distinction in their rules.*
- *Written disclosure requests in and of themselves are public records. Although the e-mail address and phone number of the requester is helpful to communicate with a requester, we have experienced the situation where requesters do not want that information made available to the public.*
- *The final paragraph is modified to include an example of a criminal defendant who may not be entitled (by Superior Court rule, CrR 4.7) to have a copy of the report. Also the word "statute" is changed to "law" to reflect that the exemption may be applicable by a statute, rule or case law.*
- *The best approach is to require all public records requests to be in writing unless the agency waives the writing requirement. The statement that verbal requests may be allowed need clarity to provide that the agency is the one that is allowed to determine the administrative process for public record requests. This provision should be revised to read: "Verbal requests may be allowed at the sole option of the agency as they can be problematic."*

PROCESSING OF PUBLIC RECORDS REQUESTS--GENERAL
NEW SECTION
WAC 44-14-040 Processing of public records requests--general.

(1) **Providing "fullest assistance."** The agency is charged by statute with providing the "fullest assistance" to requesters. **The public records officer shall process requests in the order allowing the most requests to be processed in the most efficient manner.**

- *There are many ways that records can be processed by a public records*

officer. The language should allow a public records officer discretion on how to handle public records requests without causing disruption of the agency and at the same time fulfill the obligation under the Act. That may mean that public records requests are filled in the order received or some other manner. The language here regarding "most requests" and "efficiency" is not helpful, especially when taking into account that many requests require page-by-page review to protect privacy interests and assure that records are not released contrary to state law. Do "most requests" refer to "most requesters" or "most documents?"

- *"Fullest assistance" to requesters should be construed to mean assistance in the activities undertaken by the requester – i.e. the identification, inspection and copying of records. It does not address other aspects of the internal process such as queuing of requests, reviewing requests for exempt information and other activities that are within the province of an agency.*
- *Does "fullest assistance" require the county to either A) provide a work station w/ PC for the requester to view information on the county website or proprietary program; or B) provide data in an electronic format convenient for the requester RATHER THAN the electronic format it was created in?*

(2) **Acknowledging receipt of request.** Within five business days of receipt of the request, the public records officer shall do one or more of the following:

(a) Make the records available for inspection or copying (or, if so requested and payment for the records is made or terms of payment are agreed upon, send the records to the requester);

(b) Provide a reasonable estimate of when the agency will complete its response to the request ~~records will be available~~; or

(c) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requester. Such clarification may be requested and provided by telephone. The public records officer may revise the estimate of when records will be available.

- *The duty of the agency is to respond to the request, or estimate the time in which a complete response can be made. The additional time may be necessary to determine the applicability of exemptions, prepare and Exemption Log, or notify third parties of the disclosure and allow them time to respond.*

~~(3) **Consequences of failure to respond.** If the public records officer does not respond in writing within five working days of receipt of the request for disclosure, the request may be deemed denied and the requester may obtain internal agency review or seek judicial review of the denial. See WAC 44-14-080 (2) and (4).~~

- *The language that is shown as a deletion is not consistent with the provisions of RCW 42.17.320 or 42.17.340. As such, it is properly deleted.*
- *To the extent that this proposed rule creates or is intended for a requester to "deem denied" a request after 5 days, the rule exceeds the authority granted by the legislature. The action of "deeming the request denied" is a penalty, and accordingly, its imposition is a legislative function. The proposal is problematic because an agency may not be able to satisfy the 5-day rule because of innocent,*

inadvertent mistakes, poor communication by the requester, poor listening by the agency employee, sickness, separation, retirement or vacations of key employees knowledgeable of the location and existence of records. Moreover, an agency may have an administrative review process that must be satisfied before any judicial review is possible. The requester must be required to exhaust administrative review procedures before filing a lawsuit.

- *In WAC 44-14-040(3), use of "working" days is inconsistent with other provisions of the proposed rules and the Act. There is no basis for including the concept that, if the public records officer does not respond within 5 business days, the request may be deemed denied. First, the public records officer is not required to issue a response. Many responses are issued by other agency representatives. Secondly, the statement that the request is deemed denied will create problems. Certainly, the requester has the right to utilize any available remedies if the response deadline is missed. It is not uncommon that a response is merely issued late with no intent to deny the request or disregard the statute, and its tight, 5-day requirement.*

(4) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requester and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure.

- *WAC 44-14-040(4) establishes a new standard that third parties are to be notified of the records to be released only if the records may be exempt from disclosure and the third person's "rights" may be affected. Generally, the reason to notify third parties of the date that a record may be released is that the content of the record is not exempt from disclosure. For example, a convicted felon requested property records from the county assessor's office that contain a property address and the property owner's name. These are public records that must be disclosed. Since the assessor has no information as to why the convict is requesting the information, or whether the property owner is a victim of the felon's crime, the assessor may decide to notify the property owner of the date that the record is being released so she or he can take any measures needed to protect her or himself. This section should be redrafted to follow RCW 42.17.320, which authorizes an agency "to notify third persons or agencies affected by the request."*

(5) **Records exempt from disclosure.** Some records are exempt from disclosure. If the agency believes that a record is exempt from disclosure and should be withheld, the agency ~~public records officer~~ will state the specific exemption that is applicable and provide a brief explanation of how the exemption applies to the record ~~of why the record is being~~ withheld. If only a portion of a record is exempt or withheld from disclosure, but the remainder is not exempt, the public records officer shall redact the exempt portions, provide the remaining portions, and indicate to the requester why portions of the record are being redacted.

- *RCW 42.17.310(4) sets forth the responsibilities of an agency when denying*

inspection. It requires "...a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." The language under sub-paragraph (5) is revised to be consistent with RCW 42.17.310(4).

6) **Inspection of records.**

a) The (agency) shall provide space to inspect public records. ~~and provide staff assistance to make any requested copies~~. No member of the public may remove a document from the viewing area or disassemble and file or alter any document. The requester shall indicate which documents he or she wishes to have copied.

~~b) The requester must claim or review the assembled records within thirty days of the agency's notification to him or her that the records are available for inspection or copying. If the requester or a representative of the requester fails to make arrangements to claim or review the records within the thirty-day period, the agency may close the request and refile the assembled records. A subsequent request for the same or almost identical records can be processed last.~~

- *The language in subsection (b) is not consistent with any language within chapter 42.17 RCW or case law. Accordingly, it should be deleted.*
- *We believe that if an agency is required to respond within 5 days, a requester has a similar duty to respond within 5 days.*
- *Most county departments do not have the luxury to retain files in a suspended status for 30 days waiting for someone to appear to review the documents.*
- *The requirements for copying files are covered in the next section and can be safely omitted to avoid duplication.*

7) **Providing copies of records.** After inspection is complete, if requested, the ~~public records officer~~ agency shall make the requested copies or, in the discretion of the public records officer, allow the requester to make the copies, and arrange for delivery of the documents to the requester.

- *A requester should not expect that every request will be copied while they wait. Accordingly, the rule should provide that the agency "arrange for the delivery."*
- *WAC 44-14-040(7) states that "the public records officer shall make the requested copies." The public records officer is not required to make the copies, but only needs to oversee agency compliance. See RCW 42.17.253.*
- *Sometimes the agency can provide fullest assistance by allowing the requester to make the copies, and accordingly, the model rule should be modified to allow this, as an option in the discretion of the public records officer.*

8) **Large requests.** When the request is for a large number of records, the public records officer may provide access for inspection and copying in installments, if the officer reasonably determines that it would be practical to provide the records in that way. If, within a reasonable time, the requester fails to inspect the entire set of records or one or more of the installments, the public records officer may stop searching for the remaining records and close the request.

~~**9) Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, or when the requester either withdraws the request or fails~~

~~to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer shall close the request and indicate to the requester that the (agency) has completed a diligent search for the requested records.~~

- *This language is not consistent with any language within chapter 42.17 RCW or case law. Accordingly, it should be deleted. Moreover, it places an additional responsibility on the agency to send a letter closing the public records request.*
- *WAC 44-14-040(9) states the public records officer shall indicate to the requester that the agency has completed a diligent search for the requested records. This additional notice will place an additional burden on agencies and is not required by the statute.*

~~8~~ 10) **Later discovered documents.** If, after the (agency) has informed the requester that it has provided all available records, the (agency) becomes aware of additional responsive documents existing at the time of the request, it shall promptly inform the requester of the additional documents and provide them on an expedited basis, ~~along with a written explanation of why they were not previously located and provided.~~

- *This language is not consistent with any language within chapter 42.17 RCW or case law. Accordingly, it should be deleted. Being forced to explain in writing why documents were late only invites a lawsuit for the delay between when they "should" have been found and when they were found. What if the reason for the delay is entirely innocent, under this standard the requester would still be able to get daily damages. This section amounts to imposing strict liability on the LG for later found documents and then ALSO makes the local agency put into writing an "admission against interest."*

- **Comments on WAC 44-14-040**

NEW SECTION
WAC 44-14-04001 Introduction.

- *This section is written with a well-balanced perspective.*

NEW SECTION
WAC 44-14-04002 Obligations of requesters.

- *We suggest the following example be added at the end of the last paragraph of subsection (2): "For example, a request for all records relating to landslides is not a request for an identifiable record. Whereas, a request for all documents related to a specific landslide study is a proper request."*

NEW SECTION
WAC 44-14-04003 Responsibilities of agencies in processing requests.

(1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall

not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is for a "commercial use or would violate another statute prohibiting disclosure"). RCW 42.17.270. The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW 42.17.290 and 42.17.270. However, treating requesters similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order. An agency cannot require a requester to state the purpose of the request (with limited exceptions). RCW 42.17.270. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requester is not required to answer the agency's inquiry (with limited exceptions as previously noted).

(2) **Provide "fullest assistance" and "most timely possible action."** The act requires agency procedures to provide the "fullest assistance" to a requester. RCW 42.17.290. The "fullest assistance" requirement should guide agencies when a specific question is not directly addressed by the act or model rules. "Fullest assistance" can take many forms. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW 42.17.290. "Fullest assistance" means the agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others. The act also requires an agency to provide the "most timely possible action on requests." RCW 42.17.290. This provision should also guide agencies in all aspects of public records compliance. It should be noted that this provision requires the most timely "possible" action on requests. This provision recognizes that an agency is not always capable of fulfilling a request as quickly as the requester would like.

(3) **Communicate with requester.** Communication is usually the key to a smooth public records process for both requesters and agencies. Clear requests for a small number of records usually do not require predelivery communication with the requester. However, when an agency receives a large or unclear request, the agency should communicate with the requester to clarify the request and explain the public records process. The model rules and comments should help explain the process to requesters. For large requests, the agency may ask the requester to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requester of the progress of the request. Similarly, the requester should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requester finds the records he or she is seeking at the beginning of a request. If so, the requester should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requester's cancellation communication is not in writing, the agency should confirm it in writing

(4) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request. ~~However, sometimes it is easier for an agency to create a record than find itself in a controversary about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency.~~

- *The last two sentences are gratuitous advice and should be removed. The case law is clear: an agency has no duty to create records. That is covered by the first sentence.*

(5) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to fully respond to the request. RCW 42.17.320. Fully responding can mean processing the request (assembling records, redacting, preparing a witholding index, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure. An estimate must be "reasonable." The act provides a requester a quick and simple method of challenging the reasonableness of an agency's estimate. RCW 42.17.340(2). See WAC 44-14-08008(2). The burden of proof is on the agency to prove its estimate is "reasonable." RCW 42.17.340(2). To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. Some very large requests can legitimately take months or longer to provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary. Some agencies send form letters with thirty-day estimates to all requesters, no matter the size or complexity of the request. Form letter thirty-day estimates are almost never "reasonable" because an agency, which has the burden of proof, could not prove that every single request it receives would take the same thirty day period. In order to avoid unnecessary litigation over the reasonableness of an estimate, an agency should briefly explain to the requester the basis for the estimate in the initial response. The explanation need not be elaborate but should allow the requester to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate. An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requester about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction).

An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requester access to public records.

- *WAC 44-14-04003(5), second complete paragraph that states: "but should allow the request to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate." To have to provide an explanation with each time estimate places a greater burden on the agency in responding to the records request. Providing justification for the reasonableness of each time estimate would appear to create additional litigation rather than to avoid it.*
- *Like all definitions buried throughout the rules and comments, it would be better if the definition of "fully respond," and "reasonable estimate" were placed in a central location at the beginning of the rules and then those defined words should be used consistently.*

(6) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" request. RCW 42.17.320. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records. If the requester fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320.

If the requester does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. ~~If the agency considers the request abandoned, it should send a closing letter to the requester~~.

- *For the reasons stated above, a closing letter is not required, and it imposes an unnecessary burden on the local agency. A receipt or inaction by the requester should be sufficient.*

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW 42.17.320. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

(7) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW 42.17.290.4 Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(8) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. A requester is not required to "ferret out" records on his or her own. A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. ~~One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to ask all agency employees if they have responsive records. If the agency is larger, the agency may choose only to ask the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project initially might be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. However, the other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requester of which departments are being surveyed for the documents so the requester may suggest that to other departments. It is better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows an agency to document whom it asked for records. Agency policies should require staff to promptly respond to inquiries about responsive records from the public records officer. Agency staff must provide the "fullest assistance" to requesters and replying to inquiries from the public records officer about the existence of records is one way to do so. After seemingly responsive records are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requester~~

~~on the scope of the documents to be assembled. An agency cannot "bury" a requester with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requester to select the ones he or she wants, particularly if the requester is unable or unwilling to help narrow the scope of the documents~~.

- *Portions of this paragraph are deleted because it simply explains procedures that may or may not be useful to an agency and do not necessarily reflect a standard of "best practices."*
- *Comments such as "an agency cannot 'bury' a requester with non-responsive documents" are not helpful. Similarly, a standard based upon "arguably, but not clearly responsive documents" is not helpful.*
- *If not deleted, as recommend, these comments should be revised to reflect a balanced perspective. We believe that the comments should show that the requester has an obligation to clearly identify records and respond timely to requests for clarification, and not use the Public Records Act to disrupt agency.*
- *Language should be added (similar to the language below regarding copying) that the agency may adopt policies on a case-by-case basis to assure that the response to public records requests (including the search, redaction and preparation of Exemption Log) does not disrupt other agency functions.*

(9) **Expiration of reasonable estimate.** An agency can provide a record within the time provided in its reasonable estimate or can communicate with the requester if the estimate cannot be met. When the original estimate cannot be met, it should be revised and a new estimate provided. ~~to obtain additional time to fulfill the request based on specified criteria. Unless the agency properly obtains additional time to fulfill the request, the agency is obligated to provide the record within the reasonable estimate period. Failure to do so is a denial of access to the record~~.

- *WAC 44-14-04003(9) the phrase "unless the agency properly obtains additional time to fulfill the request, the agency is obligated to provide the record within the reasonable estimate period" is of concern. Under the law, the estimate does not create such an obligation. Something like this would be preferable: "The agency should strive to provide the documents within the reasonable estimate. If it is unable to meet the goal, it should notify the requester, and provide a new estimate. An explanation of why additional time is needed is not required pursuant to Ockerman v. King County, 102 Wn. App. 212 (2000)."*
- *RCW 42.17.320 does not require the agency to get permission from the requester in the event it is unable to comply with the request within the initial time frame. Accordingly, this language should be deleted. In its place, the Agency should be required to advise the requester of whatever additional reasonable time frame that may be necessary.*
- *WAC 44-14-04003(9) and WAC 44-14-05004(4). These comments are based on what we believe to be an erroneous legal conclusion. They state that a request is deemed denied if a record is not produced precisely within the estimated time given by the agency for production. The comment does appropriately suggest that if an agency cannot produce a record within the time estimate it provided, that the agency should*

communicate with the requester to obtain additional time. However, if an estimate of 5 days is given but the document is not ready until day six, I do not believe the request is deemed denied simply because a second letter is not sent to the requester that increases the time estimate by one day.

- *This section highlights that "fullest assistance" has a constraint upon it, that the assistance cannot cause "excessive interference" with the agency's other essential functions." This is where the friction occurs.*

(10) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure. RCW 42.17.330.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains. RCW 42.17.330. This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not. RCW 42.17.330. Second, an agency cannot be held liable for its failure to notify enough people under the act. RCW 42.17.258. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW 42.17.258 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

~~The standard notice is ten days. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld.~~ When it provides a notice, the agency should include ~~the notice period in~~ the "reasonable estimate" ~~it provides to requesters~~ of the time for a response. The notice should informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requester has an interest in any legal action to prevent the disclosure of the records he or she requested. ~~Therefore, the agency's notice should inform the third party that he or she should name the requester as a party to any action to enjoin disclosure~~. If an injunctive action is filed, the Plaintiff ~~third party or agency~~ should name the requester as a party defendant or, ~~at a minimum, must inform~~ if not named, the agency should inform the requester of the action to allow the requester to intervene.

- *RCW 42.17.320 does not set forth any time frame for third parties to act when they receive notification from an agency that a public disclosure request has been made that may concern them. Reference to a "standard" 10-day time frame without providing details of the "standard" is inappropriate. A reasonable time is needed depending upon the magnitude of the public disclosure request, the age of the documents that are requested, and the ability to communicate with the third party, and the other things that may be going on in the life of that person. Certainly, the "standard" should not be less than the time to respond to a complaint in court. We recommend that the 10-day time frame be eliminated.*
- *Who should or should not be named in conjunction with an attempt to block the release of a public disclosure request is a legal matter. It is inappropriate for the comments to establish rules of court procedure or determine parties necessary to a*

dispute under the court rules. Accordingly, we recommend that this language be deleted and the substitute language be used which will keep a requester informed of the action and allow the requester to determine what to do.

- *Like WAC 44-14-040(4), WAC 44-14-040003(10) incorrectly states the basis for notifying third persons of a request. RCW 42.17.320 authorizes an agency "to notify third persons or agencies affected by the request."*
- *WAC 44-14-04003(10) comments on legal liability of an agency if the agency has a contractual obligation to provide notice of a request. This comment is not helpful and is unrelated to the Act.*
- *WAC 44-14-04003(10) states, "The standard notice is ten days." There is no basis for this in the statute. If any number of days is listed, it should be clarified as 10* ***business*** *days.*
- *WAC 44-14-04003(10) states that an agency should inform a third party to name the requester as a party to any action to enjoin disclosure. The Act states no such requirement and, even if naming the requester may be good practice, the agency has no obligation to give this kind of legal guidance. The attorney general's office has not even followed this practice of naming the requester as a party to legal action when it has sought to enjoin disclosure of public records on behalf of a state agency. This states that the agency is to provide legal advice to the requester which is not appropriate for the agency to do. The agency is not acting as legal counsel for the requester.*

NEW SECTION

WAC 44-14-05004 Responsibilities of agency in providing records.

(We note that sections 05004 and 04005 are out of order in the model rules.)

- *Much of this rule is gratuitous advice and can be safely omitted. Publishing WAC regulations of "one way" to abide by the law interferes with the discretion the legislature has afforded to agencies.*
- *Subsection 4 defining "denial" of a request is poor word choice. It is not found in the statute and this section should be revised appropriately. There is no such thing as a "denial" of a request. Every request must be fulfilled. Requests are fulfilled by an agency that provides for the inspection and copying of existing records or provides an Exemption Log describing the documents not provided.*
- *If a request is not fulfilled in the time required by the statute it is tardy, and may subject the agency to a lawsuit. There is no event of "denial" that occurs as a matter of law, and the attorney general is without authority to declare that such a "denial" has occurred.*
- *This section 4 should be revised to explain that agencies may be unable to fulfill a request in the time provided by statute because of innocent circumstances and in no way should there be a presumption that there is improper action by the agency.*
- *WAC 44-14-05004(4): The second sentence should be changed to read "does not provide the record...without the agency notifying the requester that additional time is needed."*

- *WAC 44-14-05004(4)(b)(i) states that attorney-client privileged communications should be released with the privileged communication redacted. Documents either are privileged communications or they are not. If they are privileged, they should be exempt in their entirety. This example is not a good one for most agencies to use.*
- *Subsection (4)(b) regarding redactions of documents is unnecessarily cumbersome. It is unnecessary to go to the effort of redacting the body of a memo only to repeat the heading information in a "withholding index" or "exemption log." The better approach is simply to list the documents in an exemption log. This approach has been approved by the federal courts as the "Vaughn Index" and a similar rule should be used by the attorney general.*
- *We prefer the title "exemption log" instead of "withholding index" because it more accurately states that the agency is not releasing information pursuant to an exemption in the law and, in doing so, is following the direction of the legislature to protect the privacy of individuals, confidential communications and good governance. The title also serves as a reminder that the agency employee lists the exemption, and not just the document.*
- *We suggest that a sample Exemption Log as currently used by the attorney general (or if not used, than as developed in this process) be published as an example.*
- *We suggest you develop examples for how to address exemptions for police reports on cases currently under investigation but for which charges have been filed. (For example, request for police files by lawyer for victim injured in assault). The suggestions in the comments are impractical, because there are multiple exemptions that apply to every document and the mere action of making the exemption log for redacted material is problematic. We suggest that you consult with the criminal attorneys in your office before finalizing this part of the rule.*
- *The comments should state that if the exemption is not clear, the requester has the obligation to request clarification of the exemption from the agency before pursuing administrative review or filing a lawsuit. This emphasizes that the communication over public records requires good communication by the requester and the agency, and both have the duty to inquire when they are uncertain.*
- *The comments should impose a duty on the requester to pay or pick up or arrange for delivery of documents within a specific time.*
- *It is unnecessarily duplicative to comment on retention of responses to public records requests here in subsection 6 and again in the comment 44-14-04006(3).*
- *Must an agency provide a terminal to allow the public access to documents on the web?*
- *The comments should state that when copying records, the public records officer should be able to "provide fullest assistance," depending on the circumstances in the judgment of the records officer, by allowing (but not requiring) the requester to use a public copier to make copies.*

WAC 44-14-04005 Inspection records. (1) **Obligation of requester to claim or review records.** After the agency notifies the requester that the records or an installment of them are ready for inspection or copying, the requester must claim or review the records or the installment. RCW 42.17.300 (2005). "Claim or review" means making arrangements to review or copy the entire request or an installment. An agency should provide the requester a reasonable

number of ~~thirty~~ days to make arrangements to claim or review the records. See WAC 44-14-05024. If the requester cannot claim or review the records him or herself, a representative may do so within the thirty-day period.

If a requester fails to claim or review the records or an installment on the date set for such claim or review~~after the expiration of thirty days~~, an agency is authorized to stop assembling the remainder of the records or making copies. RCW 42.17.300 (2005). If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW 42.17.290.

If a requester fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requester who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requesters, can process the second request for the now-returned records last.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requester. An agency should not limit the time for inspection to times in which the requester is unavailable. Requesters cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW 42.17.280. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW 42.17.270. An agency may have an agency employee observe the inspection of records to ensure they are not destroyed or disorganized. RCW 42.17.290. A requester cannot alter, mark on, or destroy an original record during inspection. To select a record for copying during an inspection, a requester must use a nonpermanent method such as a removable adhesive note or paper clip. Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

- *Neither RCW 42.17.290 nor the 2005 amendments require a requester to review documents within a 30-day time frame. To provide a balanced duty by the requester and the agency, the requester should follow through with the inspection or pick up of the documents for the duty of the agency to continue. As written, an agency would be required to work for 30 days copying records which have not been paid for or picked up. Moreover, 30 days is not a reasonable amount of time and could severely disrupt an on-going project that has tight court-imposed deadlines. (For example, criminal case files, or planning or permit agency files in which records are requested just before hearings). Moreover, neither provision allows the destruction of public records that would have been destroyed but for the public records request 30 days after they had been made available. We think the revised approach would be in the best interests of agencies and the public, although any modification may very well exceed the attorney general's authority.*
- *Please locate all definitions in a single section at the beginning of the rules.*

NEW SECTION
WAC 44-14-04006 Closing request and documenting compliance.

- *The policies suggested by this comment demonstrate that the Public Records Act has become more than just a records disclosure law. The retention suggestions demonstrate that agencies should make duplicates of its public records and retain copies of these records for 6 years or more. While we agree that this is a best practice, we think that records policies such as this will unnecessarily disrupt government and there needs to be a fair duty placed on the requester to minimize the need for unnecessary duplication.*
- *Under subsection 3, the retention period for a public records request should be one year, not "time consistent with the agency's retention schedules for documents with legal review." We do not believe local retention schedules have yet been revised to reflect the 2005 amendments establishing the limitations on actions regarding public records.*
- *A closing letter is a good idea for complex requests, but it is unnecessary for simple requests. The important point is that the agency and the requester communicate well, and that the agency documents its action. This may be done in a number of ways including providing a receipt, or a cover form to documents. The term "closing letter" should be omitted in favor of simply saying the "action taken should be documented by the agency in writing."*
- *An unclear request has to be "objectively unclear" and not clarified in order to rise to level of closed out. "Objectively unclear" is an ambiguous phrase that could be problematic. As indicated above, this can be handled by comments which place the duty on the requester to follow up with the agency.*
- *There is no basis for stating that an agency should send a closing letter. Setting this as a new standard practice will be costly and burdensome.*

NEW SECTION
WAC 44-14-04007 Later-discovered records.

- *This section should add a sentence to state that prepared or received after the date of the request are not "later discovered records." There is no duty on an agency to update a public records request.*

PROCESSING OF PUBLIC RECORDS REQUESTS--ELECTRONIC RECORDS

NEW SECTION
WAC 44-14-050 Processing of Public Records Requests -- electronic records.

- *The statements in subsection (3) about not providing access to computer software programs the agency does not own, etc. should reference the "trade secrets" exemption. The rule seems to say that you do not have to create anything new; and, then goes on in (3)(b) to say that it is OK. All of this (3)(c) language should be deleted. Either you have to provide customized access or you do not.*

Comments to WAC 14-14-050

NEW SECTION

WAC 44-14-05001 Access to electronic records. Many agency records are in an electronic format. An agency may provide public records in an electronic format commercially available to the requester but is not required to do so.

If the electronic records are readable only with special software available to the agency, but are unreadable to the requester without the software, the agency has two options. First, it may print out the records and then provide paper copies to the requester. As a practical matter, this may be the best practice for most requests, particularly ones that are for a small number of records. Second, for large requests where printing records may be prohibitive, the agency may allow the requester to view the records at the agency location and then provide the requester with the option of purchasing printed documents. However, there must be access to electronic public records. Offering records in an unreadable format, when they could readily be provided in a readable printed format, is not providing ~~"access"~~ inspection or copies of ~~to~~ the records.

- *Making public records available electronically can cause some unique problems. For instance, electronic records can be modified by the person receiving the documents. The modified documents could subsequently be made available to others as "originals." Accordingly, this section should be modified to address this unique circumstance. Possibly language should be added warning that electronic documents may not be in the original form.*
- *Sometimes the access does not fit into either of the two categories mentioned in paragraph 2. For example, many police departments use what is called a total station mapping system. It is essentially a survey tool which allows the mapping of a crime scene. The total station electronic data is readable by only those with the software from the manufacturer. Printouts are small and largely unreadable. I think that this section needs to incorporate a third alternative: that is, the local agency tells the requester that the requested information may only be read with certain software and that the requested record will be provided on that basis.*
- *An example using the GIS data bases would be helpful, as most counties have GIS databases in which the raw data is readable but meaningless unless it is applied to a map. Does a county have a duty to produce a custom map?*
- *The Public Records Act promotes full access by allowing inspection and copying of existing records. Accordingly the language of the last sentence is revised to use the words used by the legislature.*

NEW SECTION

WAC 44-14-05002 "Customized access" to electronic records.

- *This section can be safely omitted. The rule is that an agency need not create any such record. Whether it is easier, or not, is up to that agency. This section needs to be entirely deleted. The comments that the duty of "fullest assistance" requires the agency to create a new electronic record are not the law. Either a new record is created or not. If the record does not exist, it should not matter that it can be*

"created." As discussed above, "fullest assistance" is "assistance" to the requester in identifying records, not assistance in creating records. This approach establishes a "slippery slope" for agencies that the legislature has not required. There is a bright line that no record needs to be created, not that it is an unreasonable "burden" on the agency. If this rule is followed, we foresee future records disclosure lawsuits with expert testimony over the burden on the agency. "Fullest assistance" does not alter the Public Records Act. We agree with the premise that if there is a record, the agency will provide assistance. But, not in creating one customized record.

- *WAC 44-14-05002(2) Third paragraph: Change "an agency should consider doing so" to "may consider doing so." Also, the sentence "If customized access required significant agency staff time or special computer programming, the agency is not obligated to provide customized access." This suggests that in some cases the agency is obligated to provide customized access, which contradicts the first paragraph of the page. The language should be revised to maintain consistency.*

EXEMPTIONS
NEW SECTION
WAC 44-14-060 Exemptions.

- *See notes above regarding the index of exemptions. This rule disingenuously downplays the exemptions by stating there are "a number" of them. At last count there were 250 state and federal laws, court rules and case law that need to be consulted describing thousands of documents exempt from disclosure. A better statement is in the comment -06002. We recommend omission of "a number" and use of more precise wording.*
- *Exemptions sometimes cover documents and sometimes cover information recorded on a document. Documents such as active criminal investigations may be exempt at one time and then released from the exemption at a later date.*
- *The attorney general should prominently publish and maintain a comprehensive index of exemptions and the types of documents and information covered by the exemptions to the Act and "other state and federal laws." and allows other agencies to adopt the index by rule. This list should include exemptions provided by court rules.*
- *We believe the public and agencies would benefit if the attorney general includes in the rules or comments the purpose of exemptions, (i.e., protect privacy, assure confidentiality, protect the deliberation process, encourage good governance and productivity of workers) just like you have done in publishing the purpose of the disclosure requirements.*
- *This section should also explain the difference between the application of an exemption and a determination that a document is not a public record.*
- *If a partial list is included, then the partial list should be put out for comment and include a disclaimer (as stated by the legislature) that the agency may rely upon any exemption even though it is not listed.*

Comments to WAC 44-14-060
NEW SECTION
WAC 44-14-06001 Agency must publish list of applicable exemptions.

- *See comments above in Section 44-14-060 regarding the list of exempt documents. The reference to a good list should be a list maintained by the attorney general.*

NEW SECTION
WAC 44-14-06002 Summary of exemptions.

- *This section is not a "summary of exemptions," so a different title should be used, such as "Exemption Discussion."*
- *We recommend that you revise or delete sub section (2) (privacy exemption). Although they are correct in saying that RCW 42.17.255 is not a separate exemption statute, the comments on privacy are misleading and not put into context.*
- *Some prosecutors recommend all of subsections (2), (3), (4), (5), (6) and (7) should be removed. They are not necessary to the procedural rules and elaborate on items that are more appropriate for the attorney general's desk book, website, or other resource, not a WAC regulation.*
- *The first 7 paragraphs should do it.*
- *One deputy prosecutor stated that in any event as to subsection (7), "As a general matter, many agencies do not assert the trade secret exemption on behalf of the individual or business without first obtaining an indemnification agreement. More often they allow the potential holder of the trade secret to seek an injunction."*

COSTS OF PROVIDING COPIES OF PUBLIC RECORDS
NEW SECTION
WAC 44-14-070 Costs of providing copies of public records.

- *Before finalizing these rules, we believe the attorney general should consult with the state auditor and develop a "rate sheet" for a broad category of public records. An 8½ x 11 black and white copy is only one of many categories of documents frequently provided by agencies, and include oversized documents, color documents, photographs, maps, plat drawings, etc. The rate sheet developed by the attorney general and auditor should be the default rate sheet that all agencies use unless they have developed their own rate sheet based upon actual costs. This would be a great assistance to agencies and to the public.*
- *This section should state that certain offices have fees that are different. The rule should explain that the courts are not covered by the fee specified in the Public Records Act, and that other departments, such as the health department, ask for all standard black and white copies of death certificates at $0.15 per page, because they have a fee for death certificates. For sheriff offices, a* statute allows the actual costs "including personnel time," *see RCW 36.18.040(1)(t).*
- *Payments to a county should be made payable to "County Treasurer" not to the "Public Records Officer."*

- *Should a document sent by e-mail be subject to the same fee as a document sent by regular mail? Why not?*

Comments to WAC 44-14-070
NEW SECTION
WAC 44-14-07001 General rules for charging for copies.

- *We believe the tone and approach taken in this section is inappropriate.*
- *This should not comment on what an agency can do, not focus on what an agency "cannot" do or "attempt" to do. It should state what you can do. Subsection (2) talks about "standard photocopy charges" but goes on at length to describe a "non standard"/alternative charge. The headings should reference standard/default fee and a separate section for "non-standard"/alternative charge.*
- *See comments above regarding calculation of costs where other statutes set out a different fee.*
- *The attorney general should use this opportunity to set out a comprehensive list of all "other statutes" that concern fees for public records so that agencies can properly utilize the appropriate fee. Better yet, the Rate Sheet should be prepared to include these items.*
- *Proposed WAC 44-14-07001(6) states that an agency cannot charge sales tax for providing records. But, if the agency sends the records out to a commercial copy center to make the copies for the requester (in order to avoid disruption to the agency), the agency will pass the full amount charged by the commercial copy center on to the requester, including any sales tax charged. This is an appropriate charge, and the rules should allow it. This can be easily handled in the terms shown on an attorney general rate sheet, and a rule or comment is not necessary.*

NEW SECTION
WAC 44-14-07003 Charges for electronic records.

- *Why have a separate comment for electronic records? We believe it is better to incorporate this as a subsection of the previous comment.*
- *The comments start to tread again on "creating records." If the record is in paper form, that is how it is to be provided. Likewise, if in electronic form, that is how it is provided. We do not believe that the public should have any expectation that the local agency is going to pay to scan in x number of pages to create a disc that they can have. For example, a police agency has 100 crime scene photos in 35mm format. They can pay to have them developed or printed. But, it is inappropriate to suggest that the agency is going to scan them all onto disc.*

NEW SECTION
WAC 44-14-07004 Other statutes govern copying of particular records

- *This list should be exhaustive, and updated regularly by the attorney general and posted on the attorney general Website so that it may be referenced by all agencies. As stated earlier, there is no need for hundreds of agencies in this state to search out this information, and it would be helpful to the public if the attorney general assumed the responsibility for maintaining this list on an annual basis.*
- *This section, if retained, should mention that courts are not subject to the Public Records Act, and accordingly, the Act does not set the fee.*

NEW SECTION
WAC 44-14-07005 Waiver of copying charges.

- *NO COMMENT*

NEW SECTION
WAC 44-14-07006 Requiring partial payment.

- *NO COMMENT*

REVIEW OF DENIALS OF PUBLIC RECORDS
NEW SECTION
WAC 44-14-080 Review of denials of public records.

- *We agree that all agencies should have a process for reviewing decisions applying the public records laws to specific documents. We believe the procedure should be analogous to the procedure used for state agencies.*
- *We believe that an administrative review should be an administrative remedy that must be completed before any suit is filed (exhaustion of administrative remedy).*
- *We believe the appropriate person to make the administrative review is the prosecuting attorney for counties, not the public records officer. The idea is to get a fresh look at the issue and consider other policy implications.*
- *The "two-business day" rule is difficult, but consistent with statute.*

Comments to WAC 44-14-080
NEW SECTION
WAC 44-14-08001 Agency internal procedure for review of denials of requests.

- *NO COMMENTS*

NEW SECTION
WAC 44-14-08002 attorney general's office review of denials by state agencies.

- *NO COMMENTS*

NEW SECTION
WAC 44-14-08003 Alternative dispute resolution.

- *NO COMMENTS*

NEW SECTION
WAC 44-14-08004 Judicial review.

- *This section belongs in a desk book published by the WSBA, training materials for agencies but not in the WACs. It can be safely omitted.*
- *Perhaps this section should be entitled "statute of limitations" and reference only the new one-year statute. The rest of the section is a trial practice primer and has no place in a WAC rule.*